DEC 24 1980

No. 80-830

IN THE
Supreme Court of The United States
October Term, 1980

THE ADVERTISER COMPANY,
Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AMICI CURIAE OF THE BIRMINGHAM NEWS COMPANY, THE ALABAMA PRESS ASSOCIATION, and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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QUESTION PRESENTED FOR REVIEW

Whether a newspaper defendant is constitutionally entitled to summary judgment in a libel action based upon the defendant's accurate and complete republication or fair abridgement in its next edition, of a State cabinet officer's press release and contemporaneous press conference remarks containing defamatory matter regardless of the defendant's state of mind as to the truth or falsity of the press release and press conference remarks.

CONSENT TO FILING OF AMICUS CURIAE BRIEF

Pursuant to Rule 36, the parties in this matter hereby consent to the filing by The Birmingham News Company, The Alabama Press Association, and The Reporters Committee for Freedom of the Press of a brief as *Amicus Curiae*.

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 14 Alabama Bar Reporter 2651 and at 388 So. 2d 533 and appears as Appendix A in the Petition for a Writ of Certiorari; the opinion of the trial court, the Circuit Court of Montgomery County, Alabama, of October 30, 1979, appears as Appendix B to said Petition.

JURISDICTION

Amici adopt the grounds of jurisdiction set forth at page 1 of the Petition.

CONSTITUTIONAL PROVISIONS INVOKED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Brief Amici Curiae of
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INTEREST OF AMICI

This brief is submitted with the consent of the parties on behalf of The Birmingham News Company, The Alabama Press Association, and The Reporters Committee for Freedom of the Press.

The Birmingham News is the largest daily newspaper in the State of Alabama. It maintains a staff of resident news reporters in Montgomery, Alabama, who cover State government on a daily basis. Finance Director Bronner's press conference was covered by a Birmingham News reporter whose story it published. The essential facts of the press conference published by the petitioner were also published by the Birmingham News. The News was not

sued but has a parallel interest with the petitioner because this litigation arises from routine press coverage of State government.

The Alabama Press Association is the only trade association for newspaper publishers in the State of Alabama. It has a membership of 132 newspaper publishers in the State. Its members have a parallel interest to the Birmingham News and the petitioner, although many of the smaller newspapers do not maintain reporters at the Capitol.

The Reporters Committee for Freedom of the Press is a voluntary unincorporated association of reporters and news editors from the print and broadcast media voted to the protection of the First Amendment and freedom of information interests of the press. It has provided representation, funding, information, legal guidance, and research in virtually every major press freedoms case that has been litigated since 1970.

Amici submit that the decision of the Supreme Court of Alabama interferes with working news reporters and editors who, in most instances, are the link between information and comment from state government on the one hand and the average citizen on the other. Few citizens can attend a press conference. The public depends upon the press to republish governmental press releases and report what occurs at press conferences called by government officials, an obligation the press routinely discharges.

Amici's interest in petitioner's case stems from their necessity to know the risks in discharging this obligation.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth at pages 2-6 of the petition and summarize the facts pertaining to petitioner, the Advertiser, as follows:

David G. Bronner became Finance Director of Alabama in March, 1979. By virtue of this appointment he also became chairman of a committee charged with supervising the personnel and financial affairs of the Alabama Building Commission. One of his earliest undertakings was an investigation into the cause of widepread complaints about mismanagement in the Building Commission.

At the conclusion of the investigation in May, 1979, Mr. Bronner called a press conference which was attended by the Advertiser, and other news organizations. Mr. Bronner distributed a press release that listed four categories of "questionable activities and management" which had been uncovered as a result of his investigation. The press release also stated, "[b]ased upon the information produced by the financial investigation and a thorough review of the qualifications and the past performance of the present Building Commission personnel . . . the Building Commission discharged six employees." In response to a question, Mr. Bronner named the six discharged employees, two of whom are respondents, David H. Fulton and William B. Wyatt.

In its next edition the Advertiser published an article about the press conference. The Advertiser accurately republished the list of abuses released by Mr. Bronner, and accurately named the six discharged employees. It accurately reported that the employees had been discharged following Mr. Bronner's investigation, but did not give the

additional reason for discharge due to "qualifications and past performance."

Respondents sued Mr. Bronner claiming that he had libeled them in statements at the press conference and that the press release was false and defamatory. Respondents also sued the Advertiser for libel for republishing Mr. Bronner's press conference statements and press release.

The trial court granted Mr. Bronner and the Advertiser summary judgment on the grounds that the remarks and the written press release given by Mr. Bronner at the press conference were covered by a qualified executive privilege and that privilege "cloaked the Advertiser as well since it was merely printing the news as it found it."

Respondents Fulton and Wyatt appealed to the Alabama Supreme Court where summary judgment was reversed. The court found that in Alabama a newspaper such as the Advertiser could not fairly and accurately report a press conference without first making an "independent investigation as to the truth or falsity of [the host's] statements." The court also found that the omission of the words "qualifications and past performance" may raise a question about the accuracy of the overall report.

It is from this decision that petition for certiorari is filed.

REASONS FOR GRANTING THE WRIT

I. Introduction

"Attorney General Accuses Justice Department Staff Lawyers of Fraud
Attorney General's Press Conference Produces Allegation That Staff Attorneys Criminally Misused Their Office"

Suppose the Attorney General of the United States calls a press conference which is covered live by television, the wire services and newspapers. During this press conference, he makes a false and defamatory statement accusing several rank and file staff attorneys in the Justice Department of criminally misusing their offices.

What is the liability of a news organization if it promptly and accurately reports the false and defamatory press conference statement, even if the news organization seriously doubts the truth of the allegation? This issue has never been resolved by the Court. It is raised here in a case which involves the prompt reporting by a newspaper, on deadline, of allegedly defamatory statements made by the Alabama State Finance Director at his public press conference announcing the discharge of several rank and file employees of the State Building Commission.

Under *New York Times v. Sullivan,* 376 U.S. 254 (1964), as interpreted by the Alabama Supreme Court, the defamed employees may recover damages if the defendant news organization knew that the press conference allegations were false (a concession *Amici* will make for the purpose of this brief), or published these allegations with reckless disregard of their truth or falsity.

This reading of the *New York Times* rule produces two unacceptable censorship alternatives: either the broadcast and print news organization must suppress the official press conference statement from the public, or the news organization may publish the statement at the risk of being subjected to a libel judgment. Several federal and state courts have dealt with this issue and have reached conflicting results on disparate theories.[1]

As a result, journalists, news organizations and their attorneys have no *stare decisis* or consistent guidelines on which to rely when reporting a public press conference by government officials who make apparently false statements about matters of public interest.

The *Amici,* therefore, ask the Court to assume, for focus upon the question presented, that the press release and remarks of Alabama State Finance Director Bronner were factually false and libeled respondents Fulton and Wyatt. The Court is asked to assume further that petitioner's reporter either had professional doubt as to the factual truth of what was published at the press conference or believed the statements to be false.

So assuming, does the First Amendment protect this petitioner from the dilemma of either accepting the role of government censor or accepting the risk of civil liability for knowingly, but accurately and impartially,

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[1]See, e.g., *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.) *cert. den. sub. nom. Edwards v. New York Times Co.*, 434 U.S. 1002 (1977); *Dickey v. CBS, Inc.*, 583 F.2d 1221 (3d Cir. 1978); *Dixson v. Newsweek, Inc.*, 562 F.2d 626 (10 Cir. 1977); *Krauss v. Champaign News Gazette*, 59 111. App.3d 745, 375 N.E.2d 1362 (1978); *Orr v. Lynch*, 60 A.D.2d 949, 401 N.Y.S.2d 897 (3d Dep't) *aff'd*, 45N.Y.2d 903, 411 N.Y.S.2d 10, N.E.2d 562 (1978); *Campo Lindo For Dogs, Inc. v. New York Post Corp.*, 65 A.D.2d 650, 409 N.Y.S.2d 453 (3d Dep't 1978).

republishing defamatory matter published during a state cabinet official's press conference?

It should be recognized at the outset that press conferences called by government officials are news events in and of themselves. Government press conferences effectively manipulate the press in the sense that the press attends when called. Their purpose is to trigger the dissemination of information which the host considers newsworthy regardless of whether the press does or not. The point is, that the press should not be looked upon in this posture as "bootstrapping" into newsworthiness the content of government news releases. Thus, this type of situation is distinguished from that of *Rosenbloom v. Metromedia, Inc.*, U.S. 29 (1971), because news releases and comment published at press conferences of government officials are newsworthy whether inferred from either judicial or press standards.

The issue which this case raises is of great importance to the continued ability of the press to function as a conduit of information from government to the public. The present state of legal ambiguity fails to properly safeguard this free expression. Therefore, *Amici* urge that this Court provide its guidance.

II. The State of Mind Standard For Press Immunity Under *New York Times v. Sullivan*[2] Lacks The Breadth Necessary And Fails To Protect The Free Flow Of Information From Government Press Conferences To The Public When The Ultimate Truth Of Such Information, Although Accurately Reported, Is Controverted In A Libel Action.

The consequences of conditioning press liability on belief or disbelief regarding the factual truth of a government press release and contemporaneous remarks of a state cabinet official, as the court below has done, are constitutionally absurd. Three considerations prove this.

A. The state of mind standard for press immunity requires the press to censor ultimate falsehoods from a state cabinet official's press release and contemporaneous remarks or accurately publish them and risk civil liability.

The Supreme Court of Alabama has effectively cast petitioner in the role of government censor upon pain of civil liability. The public has the right to know through the press what government officials say in press conferences,

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[2]"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not . . ." New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964).

". . . a high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

". . . evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

whether it is true or false, defamatory or not. Constitutional protection for the accurate and impartial report of the event is essential. It is worthy of this protection because such reports go to the heart of the public's perception of and responsibility for government. The state of mind protection fails to serve this core constitutional interest.

As stated by this Court in *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975):

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media *to report fully and accurately the proceedings of government*, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. . . . *Id.* at 492. (Emphasis added).

The Court in *Cox* questioned whether the State of Georgia may impose civil sanctions in a right of privacy action for the "accurate publication" of the identity of a rape victim obtained from government records in violation of a state statute. "We are convinced that the State may not do so." *Id.* at 491.

Following *Cox*, this Court in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), held that the First Amendment did not permit criminal sanctions to be imposed by the State of Virginia for publishing truthful in-

formation regarding confidential proceedings of a state judicial inquiry commission.

In *Smith v. Daily Mail,* 442 U.S. 97 (1979), the Court held that a state cannot, consistent with the First and Fourteenth Amendments, punish the truthful publication of a delinquent juvenile's identity lawfully obtained by a newspaper.

The Court stated:

"Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards. . . ." *Id.* at 102.

Petitioner's information was lawfully obtained. It was accurately reported but allegedly false. *Cox, Landmark,* and *Daily Mail* mandate a rationale that the State of Alabama may not punish its publication unless that punishment furthers an interest more substantial than the public's right to know the identity of the respondent state employees and the stated causes for their discharge. *Cox, Landmark,* and *Daily Mail* protect the press from civil or criminal sanctions imposed by a state for publishing accurate government information.

Amici recognize that these three cases did not involve a controversy that the published information was false; consequently they do not reach the question urged in this petition. They do instill the rationale however, that a state may not protect the reputational interests of its discharged employees, through civil actions for punitive damages which aim to discipline the press to either censor falsehoods from a state official's press statements or effectively insure their truth by risking civil liability for their falsity.

B. The state of mind standard for press immunity situationally imposes an inherently unequal immunity as between print media coverage of a state cabinet official's press conference and live press coverage by radio and television and to that extent fails in its purpose of protecting the state's interest in discouraging defamation.

The state of mind standard intrinsically contemplates an editorial perception of truth or falsity before publication of information in the print media. It requires a dutiful editorial process that deliberately includes or excludes, accepts or rejects. This duty is the touchstone of the conditional privilege against liability for defamation whether that duty is breached allegedly by willfulness or simple negligence.

Time to perceive is required to discharge this duty; indeed for the standard to be meaningful there must be sufficient time between receipt and publication of news for some editorial deliberation.

Live press coverage by television and radio permits no time to edit. Therefore, live broadcasting of a government press conference must either enjoy an absolute situational immunity or incur common law strict liability for broadcasting a government official's defamatory statements verbatim.

The electronic media's state of mind in this context is functionally irrelevant since the opportunity to edit is mechanically precluded by the state of the art.

Consequently the print media and the electronic media will be judged under different standards for doing the same thing, that is, covering the same government official's press conference.

In *Smith v. Daily Mail, supra,* Mr. Justice Rehnquist in his concurring opinion stated:

> The West Virginia statute prohibits only newspapers from printing the names of youths charged in juvenile proceedings. Electronic media and other forms of publications can announce the young person's name with impunity. In fact, in this case three radio stations broadcast the alleged assailant's name before it was published by *The Charleston Daily Mail. . . . This statute largely fails to achieve its purpose.* It is difficult to take every seriously West Virginia's assertive need to preserve the anonymity of its youthful offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment.[2] (emphasis added)

Mr. Justice Rehnquist, in footnote 3 added:

> I believe that an obvious failure of a state statute to achieve its purpose is entitled to considerable weight in the balancing process that is employed in deciding issues arising under the First and Fourteenth Amendment protections accorded freedom of expression. . . . *Id.* at 110.

The petition should be granted upon this rationale. The standard imposed by the court below should be replaced with a situational immunity for all media that equally protects both.

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[3] *See also,* Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (*per curiam*) (First And Fourteenth Amendments will not permit a state court to prohibit the publication of information obtained at open court proceedings, when that information had already been widely disseminated).

C. The state of mind standard for press immunity situationally imposed an inherently unequal immunity between believing and disbelieving members of the print media covering the same press conference.

A true believer among the attendant press who discharges his newsgathering duties in a smorgasbord fashion, accepting as truthful, the content of a press release placed before him by a state cabinet official, enjoys a constitutional immunity from liability for republishing the falsehoods disseminated at the press conference.

A working reporter who covers same press conference but, through his diligence, has information casting doubt on its truthfulness does not enjoy the same immunity. Under the decision below the latter may not meet the same deadline as his counterpart unless he and his publisher assume the risk of liability or censor to a barren report that "six unnamed employees of the State Building Commission were discharged for cause following a state investigation. . . ."

III. A Situational Standard For Press Immunity Protecting The Free Flow Of Accurate News From Government Press Conferences To The Public Is Not Derivative Of Or Limited To The Scope Of Executive Immunity; It Is Mandated By The First Amendment.

In *Barr v. Matteo,* 360 U.S. 564 (1959), this Court sustained an absolute immunity for a federal official sued for defamation based upon his press release made in the exercise of his official responsibilities.

After quoting Judge Learned Hand in *Gregorie v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949), who "admirably expressed" the reasons for the recognition of the privilege,

this Court said: ". . . The privilege is not a badge or emolument of exalted office, but an expression of a policy to aid in the effective functioning of government. . . ." *Barr,* at 571.

The court below expressly rejected the absolute *Barr* v. *Matteo* executive immunity in *Browning v. Birmingham News,* 348 So.2d 455, (Ala. 1977), in favor of a more limited conditional privilege *to which it confines petitioner in the opinion below.*

"As to defendant Advertiser, we find as did the trial judge, that the Advertiser was protected by Bronner's conditional privilege to the extent that it reported fairly and accurately the information released at the press conference." A 12-13 (emphasis added).

Thus petitioner's conditional privilege was held derivative merely of the privilege possessed by Bronner and limited to its scope defined in *Browning, supra,* to the exclusion of the independent mandates of the First Amendment.

Executive immunity, absolute or conditional, protects the effective functioning of government; it is not designed to protect the press. Under the First Amendment press freedoms are not limited to or dependent upon executive immunity. Indeed the existence of executive immunity was cited in *New York Times v. Sullivan, supra,* 376 U.S. at 283, to justify an independent ". . . fair equivalent of the immunity granted to the officials themselves."

The *New York Times v. Sullivan* conditional privilege was thereby justified as a "fair equivalent" of absolute *Barr v. Matteo* executive immunity. In Alabama the *New York Times v. Sullivan* conditional privilege will be equated to Bronner's if left in the custody of the court below.

One prospect of the lower court's error: If Bronner acted unlawfully outside the "penumbra of his official duties" (which suggests hotter newsworthiness) he enjoys no privilege. If petitioner's privilege is solely derivative of Bronner's and Bronner has none, we are back to square one of common law liability in Alabama.

Derivative immunity, dependent upon an incumbent office holder's scope of responsibility, bifurcates and favors one side of a controversy. A libelee's retaliatory remarks, denials or explanations must be situationally protected also to protect the contemplated and competitive robust debate which choice over censorship we have inherited along with the notion that debate produces the closest we will come to the truth. The lower court's error hurts rather than helps this process.

IV. Impermissible Fault Standard: Failure To Make An Independent Investigation As To The Truth Or Falsity Of Bronner's Statements.

This Court is *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), invited the states to fashion appropriate fault standards to protect the reputation of private individuals. The court below accepted this invitation by insinuating a mandatory constraint upon petitioner to make an "independent investigation" as to the truth or falsity of Bronner's statements, presumably before reporting news regarding the discharged for cause of six state employees.

For this constraint to be constitutional, it must be based in turn on petitioner's constitutional right of access to criminal investigative files of the State of Alabama. There is no such right. Without the right of access petitioner's investigation is stymied at the outset.

Assuming petitioner's access, the constraint to investigative transforms petitioner into either Bronner's role as investigator-prosecutor or the respondent's advocate rather than reporter.

Consequently, the constraint independently to investigate erroneously presumes the right of access and editorial resources to be cast in an involuntary role. It also ignores the fact that news has the shortest shelf life of any product known to the industrial revolution.

The only possible purpose a mandated pre-publication "independent" investigation requirement could serve is to reflect editorially its results. Its design must be to verify, dispute or neutralize the defamatory innuendos inferrable from the press release. Even if verified it would reflect, however, the petitioner's judgmental findings that concur in whole or in part with the government's.

If petitioner's findings dispute or neutralize the government's, the requirement erroneously presumes that the respondents will issue to petitioner their denials or explanations in preference to filing suit. Whatever the results, it requires petitioner to make news rather than report news.

The urgency of this Court's timely scrutiny of this constraint must not be overlooked. As the final arbitor of First Amendment freedoms this Court should scrutinize even the vaguest judicial notions that if left to germinate, can grow into substantial restraints upon the press. What may be planted here is a state-imposed fairness doctrine that is equally beguiling but not more permissible than the facially fair Florida right or reply statute condemned in *Miami Herald v. Tornillo,* 418 U.S. 241 (1974): "Government restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. . . ." *Id.* at 246.

Under *St. Amant v. Thompson, supra,* the failure to investigate was appropriately held to be irrelevant.

V. Appropriate Standard: "The Publication of Defamatory Matter Concerning Another in a Report of an Official Action or Proceeding or of a Meeting Open to the Public That Deals With a Matter of Public Concern is Privileged if the Report is Accurate and Complete or a Fair Abridgement of the Occurrence Reported."[3]

Instead of the standards imposed by the court below, *Amici* urge that this Court reverse and adopt as a mandate of the First Amendment the privilege delineated in the *Restatement.*

This privilege is conditioned upon the report being: ". . . accurate and complete or a fair abridgement of the occurrence reported." "Abridgement" as used in Section 611 means a summary of the verbatim which communicates its major point. "Fair" qualifies abridgement in the sense that no major point is distorted or omitted, the occurrence or concurrence of which permits a defamatory innuendo that is not permitted by the verbatim.

"Fair" does not mean that the reporter must apply to the verbatim his independent judgment as to truth of falsity, credibility or incredibility of the verbatim; in so doing the reporter would be editorializing rather than reporting. "Fair" does not mean a mandated access as in "fairness doctrine".

The objective standard urged by *Amici* invites and cautions the press to be impartial and neutral in reporting defamatory matter originating in public proceedings. In-

[3] *Restatement (Second) of Torts* Section 611.

deed, the reporter who visits his subjective judgment as to truth or falsity, credibility or incredibility upon the verbatim to the extent that a major point is distorted or omitted risks judicial scrutiny that the abridgement is not fair and consequently not privileged.

Here lies the constitutionally permissible and necessary fault standard; the fault being the failure to do what is reasonably necessary to insure that the report is "accurate and complete or a fair abridgement", and specifically with reference to the alternative "fair abridgement", does not distort or omit a major point, the occurence or concurrence of which permits a defamatory innuendo not permitted by the verbatim.

Petitioner's omission to quote Bronner's shorthand characterization that respondents were discharged ". . . because of qualifications and performance . . ." (A-13) does not meet this test. This omission is the scintilla of the lower court's focus. Bronner's shorthand characterization was not a major point; it was a descriptive convenience; it did not qualify the other major points to the extent that its omission permits the defamatory innuendo that the respondents were discharged for other than one or more of the four specific causes accurately republished by petitioner. Alternatively stated: its inclusion would not exonerate respondents from the defamatory innuendos of anyone of the four specific and accurately republished causes for discharge in the verbatim.

To otherwise conclude would impose the impermissible classical consequences of common law pleading upon the press report; strictures from which the adoption of code pleading generally relieved the bench and bar. A fault standard imposed by courts upon the press for publishing alleged false and defamatory matter must provide the breathing space to report a cabinet official's press con-

ference with no more specificity than is required of the respondents to state their complaint.

Moreover, it is a credible thesis that the press must have relatively more breathing space in reporting deadline news.

CONCLUSION

Amici respectfully urge the Court to enter an order granting the petition in order that the substantial constitutional questions raised by petitioner and *Amici* can be fully examined, and urge further that the judgment below be reversed and rendered.

Respectfully submitted,

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